INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statutes involved	2
Statement	2
Introduction and summary of argument	5
Argument	7
I. The authority granted by Congress to internal revenue agents to make warrantless inspections of the premises of registered liquor dealers in order to determine if the distilled spirits kept on those premises are being maintained in accord with statutory requirements, is not violative of the Fourth Amendment	7
A. Since long before the adoption of the Fourth Amendment the liquor industry has been subject to strict governmental inspection of the premises on which it is conducted	7
B. The decisions in *Camara* and *See* do not require invalidation of Congress' authorization of warrantless inspection of the premises of liquor dealers	17
II. The inspection here was not violative of the statutory scheme nor was the search rendered unreasonable by the breaking of the storeroom lock	29
Conclusion	35
Appendix	37

372-507—70——1

CITATIONS

Cases:

	Page
Boyd v. *United States*, 116 U.S. 616	15, 16, 23
Camara v. *Municipal Court*, 387 U.S. 523	4, 5, 6, 7, 17, 18, 19, 20, 21, 22, 24, 26, 27, 28, 29
Compagnie Francaise v. *Board of Health*, 186 U.S. 380	27
Davis v. *United States*, 328 U.S. 582	23
Fields v. *United States*, 355 F. 2d 543, petition for certiorari dismissed, 384 U.S. 935	33
Finn's Liquor Shop, Inc. v. *State Liqour Authority*, 24 N.Y. 2d 647, 249 N.E. 2d 440	25, 34
Jacobson v. *Massachusetts*, 197 U.S. 11	27
Katz v. *United States*, 389 U.S. 347	4, 23
Kroplin v. *Traux*, 119 Ohio St. 610, 165 N.E. 498	28
License Tax Cases, 5 Wall. 462	11, 13
Mancusi v. *De Forte*, 392 U.S. 364	23
Miller v. *United States*, 357 U.S. 301	32, 33
North American Cold Storage Co. v. *City of Chicago*, 211 U.S. 306	27
Peeples v. *United States*, 341 F. 2d 60, certiorari denied, 380 U.S. 988	23, 24
Ray v. *United States*, 374 F. 2d 638, certiorari denied, 389 U.S. 833	23
Terry v. *United States*, 392 U.S. 1	28
Sabbath v. *United States*, 391 U.S. 585	32
See v. *City of Seattle*, 387 U.S. 541	4, 5, 6, 7, 17, 18, 19, 20, 21, 22, 23, 26, 28, 29, 32
Semayne's Case, 5 Coke 91, 77 Eng. Rep. 194	33
United States v. *Frisch*, 140 F. 2d 660	34
United States v. *Hassell*, 336 F. 2d 684	33
United States v. *Ulrici*, 111 U.S. 38	12
Zap v. *United States*, 328 U.S. 624, vacated on other grounds, 330 U.S. 800	23

Constitution, statutes, and rule:

	Page
United States Constitution, Fourth Amendment	4, 5, 6, 7, 10, 12, 15, 17, 18, 20, 26, 32
Act of March 3, 1791, 1 Stat. 199 *et seq.*:	
Sec. 26	11
Sec. 29	10
Sec. 32	11
Act of July 24, 1813, Section 5, 3 Stat. 42	11
Act of June 30, 1864, Section 79, part five, 13 Stat. 223 *et seq*	13
Act of July 20, 1868, 15 Stat. 131	12
15 Stat. 130, Section 15; Rev. Stat. § 3271 (2d ed. 1878)	12
15 Stat. 139, Section 32; Rev. Stat. § 3276 (2d ed. 1878)	12
15 Stat. 141, Sec. 38; Rev. Stat. § 3252 (2d ed. 1878)	12
18 U.S.C. 3109	33
18 U.S.C. 3731	4
26 U.S.C.:	
3601 (1952 ed.)	13
5121(a)	3, 17, 37
5122(a)	17, 37
5146(b)	4, 14, 17, 24, 34, 37
5203(b)	12
5301(c)	13, 14, 22, 37
7212(a)	12, 30
7323	31
7342	30, 31, 38
7401	31
7606	4, 14, 24, 31, 34, 38
28 U.S.C. 1291	4
Act of October 10, 1977 (Mass. Bay Colony)	9
Act of June 8, 1692 (Mass. Bay Colony)	10
San Francisco City Housing Code, Section 503	18
Seattle Fire Code, Section 8.01.140	18
Act of 3 Geo. 3, c. 11	9

Constitution, statutes and rule—Continued
Page
Act of 7 Geo. 3, c. 12:
§ 10 9
§ 14 9
Act of 5 & 6 Edw. 6, c. 25 8
Act of 12 Car. 2, c. 23, § 19 8
Act of 13 & 14 Car. 2, c. 11, § 5 10
Customs and Excise Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44, § 131(5) 15
Licensing Act of 1627, 3 Car. 1, c. 3 ..... 8, 9
Licensing Act of 1953, 1 & 2 Eliz. 2, c. 46, § 131(1) 15
R. S. 3177 (Rev. Stat., 2d ed., 1878) 13
Miscellaneous:
Bureau of Internal Revenue Service, Monographs of the United States Government, No. 25, pp. 27–28 12
Byse, *Alcoholic Beverage Control Before Repeal*, 7 Law and Contem. Prob. 544–545 (1940) 9
H. Rep. No. 1337, 83d Cong., 2d Sess. 13
Hansard, *Parliamentary History of England* (1813), vol. 15 ..... 8, 9
Howie, *Three Hundred Years of the Liquor Problem in Massachusetts*, 18 Mass. L.Q. 75, (May, 1933) 9
Internal Revenue Service, Fiscal 1968, *Alcoholic and Tobacco Summary Statistics*, (1969) 12, 17
Porritt, *Five Centuries of Liquor Legislation in England*, 10 Pol. Sci. Q. 615 (1895) 8
S. Rep. No. 1622, 83d Cong., 2d Sess. 13
S. Rep. No. 2090, 85th Cong., 2d Sess. 13, 15
5 Wilson, *A History of the American People*, 95 12
Wroth and Zobel, eds., *Legal Papers of John Adams, vol. 2* (1965) 10

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 108

THE COLONNADE CATERING CORP., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 43a–57a) is reported at 410 F. 2d 197. The memorandum opinion of the district court (A. 38a–42a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1969. The petition for a writ of certiorari was filed on May 13, 1969, and certiorari was granted on October 13, 1969. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether agents of the Internal Revenue Service, acting under statutory inspection authority may, consonant with the Fourth Amendment standard of

reasonableness, inspect without a warrant during business hours distilled spirits on the business premises of a corporation holding a federal retail liquor dealer's occupational tax stamp.

2. Whether the inspection and seizure in this case were rendered unreasonable because the agents gained access to the portion of the premises in which the refilled bottles were found (a locked storeroom) by breaking the lock of the storeroom door after being refused entrance to the storeroom by the person in charge of the premises.

STATUTES INVOLVED

The relevant provisions of the Internal Revenue Code are set out in the Appendix, *infra*, pp. 37–38.

STATEMENT

At approximately 4:00 p.m., on Saturday, May 18, 1968, three special investigators of the Internal Revenue Service, Alcohol and Tobacco Tax Division, accompanied by a Nassau County policeman, entered the business premises of the petitioner, a catering establishment in Nassau County, New York (A. 5a, 25a). One of the federal agents had been a guest at a party on the same premises one week earlier and "had noted possible violations of the excise tax law" (A. 38a); at that time, he had observed what he thought were resealed bottles of liquor.[1]

Colonnade Catering Corp. was incorporated under the laws of the State of New York and was licensed

[1] Alteration of the contents of liquor bottles is prohibited by 26 U.S.C. 5301(c) (see Appendix, *infra* pp. 37–38).

by the State to serve alcoholic beverages (A. 5a). Colonnade was also the holder of a federal retail liquor dealer's occupational tax stamp as required by 26 U.S.C. 5121(a) (A. 24a; see Appendix, *infra* p. 37).

At the time of the agents' entry, a party was in progress in Colonnade's ballroom. With the consent of the banquet manager, the agents observed the activity in the ballroom where liquor was being served (A. 25a, 32a–33a). Without the manager's consent, the agents also inspected the cellar of the building (A. 25a). They then asked the manager to open the liquor storeroom, which was located about seventy-five feet from the ballroom (A. 20a–21a, 25a–26a). The manager said that the only person authorized to open the locked storeroom was Colonnade's president, Salvatore E. Rozzo, and that he was not on the premises at that time (A. 6a, 26a).

When Mr. Rozzo arrived shortly thereafter, he refused to open the storeroom (A. 26a). He asked the agents whether they had a search warrant, and was told that they did not and that they were entitled to inspect the storeroom without a warrant (A. 6a). When he continued to refuse to unlock the room, an agent broke the lock (A. 7a, 26a). The agents then entered the storeroom and removed fifty-three bottles of liquor, some full and others partially filled, and two funnels (A. 7a, 11a–15a). Thirty-eight bottles were seized as comparative samples, and fifteen bottles were seized to determine whether their contents were genuine (A. 11a–14a). Chemical tests on these fifteen

bottles were conducted by the agents on Colonnade's premises (A. 7a).

On May 28, 1968, Colonnade filed a petition in the United States District Court for the Eastern District of New York under Rule 41(e), Fed. R. Crim. P., seeking the return of the seized liquor and its suppression as evidence (A. 5a–15a). The district court, after a hearing, granted the petition. It held that, under this Court's decisions in *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, the search of the storeroom (which the court characterized as an area sought to be preserved as private under *Katz* v. *United States,* 389 U.S. 347) was invalid under the Fourth Amendment because of the absence of a search warrant (A. 38a–42a). On the government's appeal,[2] the court of appeals reversed, holding that the rationale of *Camara* and *See* does not require warrants for liquor inspections, such as were involved here, which are authorized by 26 U.S.C. 5146(b) and 7606 (see Appendix, *infra* pp. 37, 38). It reasoned that one who engages in the highly regulated business of a liquor dealer may reasonably be

[2] In our brief in opposition, we urged that the court of appeals had jurisdiction of the appeal under 28 U.S.C. 1291 even though the parties and the court of appeals believed that the appeal was authorized under 18 U.S.C. 3731 (Br. in Opp. 6–7). Petitioner now agrees that the court of appeals had such jurisdicition (Pet. Br. 6); accordingly, that issue is no longer in the case.

required to permit an inspection of his business premises during regular business hours by Internal Revenue agents proceeding without a warrant—in light of the fact that the narrowness and specificity of the statutory authorization serves the essential function of a warrant (A. 52a; 410 F. 2d at 202). The court rejected the claim that the use of force in gaining access to the storeroom in this case rendered the search and seizure unreasonable, noting that only the force necessary to break the lock was employed and that the agents used such force only after they had announced their authority and purpose and consent to their entry had nonetheless been denied (A. 56a; 410 F. 2d at 204).

INTRODUCTION AND SUMMARY OF ARGUMENT

The thrust of petitioner's argument is that the decisions of this Court in *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, compel a holding that the warrantless inspection and seizure in this case, effected by forcible entry into petitioner's storeroom, was contrary to the Fourth Amendment. This contention puts into issue whether Congress has constitutional authority to establish a warrantless inspection procedure directed at the examination of distilled spirts on the premises of a registered retail liquor dealer. It is our submission that Congress has such authority. As we will show, the statutory scheme involved here stems from a long

history of close governmental supervision and control over the liquor industry, including a power of warrantless inspection, which had settled roots long before the adoption of the Fourth Amendment. We will further show that the rationale underlying *Camara* and *See*—that the warrant procedure of the Fourth Amendment is required where there is no demonstrable need for broad warrantless inspection authority and where the danger to the right of privacy inherent in such inspection schemes can be challenged only in a criminal prosecution for refusing to permit entry—does not apply here. We contend that the *Camara* and *See* decisions should not be extended to bar warrantless inspection where, as here, the inspection is directed at the commodity of a highly regulated industry, the businessmen involved in this industry cannot be unaware of the inspection authority granted by Congress, and the public interest in prompt action outweighs the minimal intrusion into privacy involved in the inspection.

The remaining issue is whether the method of inspection employed here—including the breaking of the storeroom lock—went beyond the bounds of reasonableness. As to this, it is our position that, in the circumstances, the agents acted within the scope of their statutory authority and consistently with constitutional requirements.

ARGUMENT

I

THE AUTHORITY GRANTED BY CONGRESS TO INTERNAL REVENUE AGENTS TO MAKE WARRANTLESS INSPECTIONS OF THE PREMISES OF REGISTERED LIQUOR DEALERS IN ORDER TO DETERMINE IF THE DISTILLED SPIRITS KEPT ON THOSE PREMISES ARE BEING MAINTAINED IN ACCORD WITH STATUTORY REQUIREMENTS, IS NOT VIOLATIVE OF THE FOURTH AMENDMENT

Before turning to an analysis of the bearing of *Camara* v. *Municipal Court,* 387 U.S. 523, and *See* v. *City of Seattle,* 387 U.S. 541, on the validity of the instant statutory scheme, we believe it is important to summarize the unique legal history of the liquor industry. That history shows that the industry has long and consistently been subject to pervasive governmental control and regulation, and that the authority to inspect the premises on which the industry conducts its business has always been deemed an indispensable ingredient for successful regulation and an important means of preventing fraud on the revenue.

A. SINCE LONG BEFORE THE ADOPTION OF THE FOURTH AMENDMENT THE LIQUOR INDUSTRY HAS BEEN SUBJECT TO STRICT GOVERNMENTAL INSPECTION OF THE PREMISES ON WHICH IT IS CONDUCTED

1. Regulation of the liquor industry in England can be traced back to the thirteenth-century "assize of bread and ale" which, like a number of similar provisions enacted during the fourteenth and fifteenth centuries, was principally concerned with setting the price of liquor sold for on-premises consumption and

maintaining order in the taverns.[3] The first licensing act was passed in England in 1552 (Act of 5 & 6 Edw. 6, c. 25), and the scope of the licensing system was broadened to include all sellers of spirits by the Licensing Act of 1627 (3 Car. 1, c. 3). The first excise taxes on liquor were levied in 1643, and these revenues were settled on the king in 1660. The legislation of 1660—the precursor of modern-day liquor legislation—provided that commissioners appointed by the king could themselves appoint "gagers" who were to be permitted "at all times, as well by night as by day" to enter on demand brewing houses, distilling houses and any other places where beer or liquor was manufactured in order to measure the amounts being produced. The brewer was forbidden to sell his product if he refused to allow the gager to enter (12 Car. 2, c. 23, § 19).

This right of entry to commercial establishments producing and selling distilled spirits was specifically recognized by William Pitt, Earl of Chatham, during the 1763 debates on a bill to levy an excise tax on "cyder and perry." He opposed the extension of this authority to those who produced cider at home, and it was in this context that he made the plea to protect "the poorest man * * * in his cottage" (see Pet. Br. 13).[4] Presumably to insure that individuals would be

[3] Porritt, *Five Centuries of Liquor Legislation in England*, 10 Pol. Sci. Q. 615 (1895).

[4] An enlightening addition to those remarks is reported in Hansard, *Parliamentary History of England* (1813), vol. 15, column 1307. Speaking of Pitt's argument, Hansard wrote:

"The laws of excise are odious and grievous to the dealer, but intolerable to the private person. The precedent, he con-

able to produce cider at home for their own consumption free from governmental interference, Parliament made general provision for the excise collector to enter only mill houses, storehouses and cellars used to produce and store cider (7 Geo. 3, c. 12, § 10). This legislation provided also that any person who wished to manufacture cider for his own use could pay a yearly fee for each member of his household and would then be exempt from "search and survey" (*id.* at § 14).[5]

A parallel development is found in the American Colonies. Colonial legislatures modeled their first liquor laws for the most part on the English Licensing Act of 1627, *supra* p. 8. Typically these laws required retail dealers to obtain licenses and post bonds and also set the prices at which liquor could be sold for on-premises consumption.[6]

In Massachusetts, which had a particularly comprehensive system of liquor regulation,[7] the right of the constable to enter a retail liquor establishment was recognized by statute as early as 1646. The Act of October 10, 1677, provided for the appointment of

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tended, was particularly dangerous, when men by their birth, education, and profession, very distinct from the trader, became subjected to those laws."

Reporting further on the debate, Hansard wrote (*id.*, at columns 1307–1309): "The grower of hops has often his very bedchamber visited by an exciseman; for the poorer sort of farmers are obliged to dry and weigh their hops in their own houses."

[5] Contrast the Act of 3 Geo. 3, c. 11, regulating the manufacture of bread, which provided for inspection only by warrant.

[6] *Byse, Alcoholic Beverage Control Before Repeal*, 7 Law and Contem. Prob. 544–545 (1940).

[7] See Howie, *Three Hundred Years of the Liquor Problem in Massachusetts*, 18 Mass. L.Q. 75, 93–121 (May, 1933).

"tythingmen," who were charged with the inspection of "houses of entertainment" to enforce the laws against violation of the sabbath. The Act of June 8, 1692, provided that a collector of the excise had the right to enter any "Retailer's House, Cellar, or Warehouse, to Search for such Wares or Liquors, etc., as are not duely Entered nor the Excise paid for the same, and such Wares or Liquors, etc., so found, to Seize and Secure * * *." Significantly, this provision was enacted some thirty years after the writs of assistance legislation of 1662 (Act of 13 & 14 Car. 2, c. 11, § 5). The enactment of this inspection provision despite the colonists' hatred of the unlimited search authority granted by the writs of assistance strongly suggests that the argument of James Otis in *Paxton's* case (see Pet. Br. 16), challenging the legality of the writs, was directed not at inspections of *licensed liquor dealers* but rather at inspections, under the authority of the writs, of the "house, shop, cellar, warehouse or room, or other place" of private individuals (13 & 14 Car. 2, c. 11, § 5).[8]

2. In 1791, the year in which the Fourth Amendment was ratified, Congress imposed an excise tax on distilled spirits imported from abroad and on liquor distilled in the United States (Act of March 3, 1791, 1 Stat. 199). The statute granted broad authority to inspect distilling premises and the premises of the importer. Section 29 thus provided (1 Stat. 206):

That it shall be lawful for the officers of

[8] See generally Wroth and Zobel, eds., *Legal Papers of John Adams* (1965), vol. 2, pp. 106–144.

> inspection of each survey at all times in the daytime, upon request, to enter into all and every the houses, store-houses, ware-houses, buildings and places which shall have been [registered] in manner aforesaid, and by tasting, guaging or otherwise, to take an account of the quantity, kinds and proofs of the said spirits therein contained; and also take samples thereof, paying for the same the usual price.

See, also, Section 26 (1 Stat. 205).[9] A similar right of entry to inspect distilleries was reaffirmed in 1813 (Act of July 24, 1813, Section 5, 3 Stat. 42, 43–44).

It is, of course, true that this early federal legislation did not in terms deal with inspection of the premises of a retail liquor dealer. This may fairly be explained, however, by the fact that the *federal* government was not then exercising general regulatory authority over retail dealers.[10] As we have noted, the 1791 Act did authorize warrantless inspection of the

[9] This 1791 statute also contained a provision authorizing the issuance of a search warrant (Section 32, 1 Stat. 207). However, the search warrant provision applied only where there was "reasonable cause of suspicion" "to be made out to the satisfaction" of a judge or justice of the peace that the distilled spirits had been fraudulently hidden, deposited or concealed "in any place whatsoever, with intent to evade the duties thereby imposed on them." It had no relation to the customary inspection authority utilized to see that the distiller and importer was carrying on his business in accordance with law, on his *business premises*.

[10] While there was some early federal licensing of liquor dealers for revenue purposes, these were temporary measures which, when no longer needed, were repealed. See *License Tax Cases*, 5 Wall. 462, 471–472.

business premises of distillers and importers.[11] There is no reason to assume that the framers of that legislation believed that the Fourth Amendment required a different method of regulating retailers (some of whom were also distillers during this period).

The purpose of statutory regulation of distilleries, including inspection, was, and is, to avoid substantial losses of revenue through fraud. Cf. *United States* v. *Ulrici*, 111 U.S. 38, 40.[12] When Congress found the same danger of significant fraud on the revenue arising in the retail liquor field, it authorized similar war-

[11] In 1868 Congress enacted the first comprehensive regulatory scheme particularly directed at distillers and their premises as well as the warehouses in which large quantities of distilled spirits were kept (Act of July 20, 1868, 15 Stat. 131). This legislation was enacted because of massive frauds on the revenue perpetrated by the "Whiskey Ring". See Bureau of Internal Revenue Service, Monographs of the United States Government, No. 25, pp. 27–28; 5 Wilson, *A History of the American People* 95 (1902).

The 1868 statute granted broad regulatory authority over distillery operations to insure against fraud on the revenue. For example, provision was made to penalize the addition of any substance to distilled spirits before the tax had been paid (Sec. 38, 15 Stat. 141; Rev. Stat. § 3252 (2d ed. 1878)); a storekeeper was to be appointed for each warehouse (Sec. 15, 15 Stat. 130; Rev. Stat. § 3271 (2d ed. 1878); and revenue officers were given access to all parts of a distiller's premises, even to the extent of breaking in where entry was refused (Sec. 32, 15 Stat. 139; Rev. Stat. § 3276 (2d ed. 1878)). This authority to break into distilleries without a warrant exists to this day. See 26 U.S.C. 5203(b).

[12] In fiscal 1968, for example, the federal government collected some $4,287,236,646.00 in taxes on distilled spirits, wine and beer. The tax is now $10.50 per gallon, and at the end of fiscal 1968 there was stored in bonded warehouses liquor having a tax value of more than 11½ billion dollars. See Internal Revenue Service, *Fiscal 1968, Alcoholic and Tobacco Summary Statistics*, 1, 2, 15, 77 (1969).

rantless inspections of the business premises of liquor dealers.[13] In recommending the enactment of 26 U.S.C. 5301(c) (see Appendix, *infra* pp. 37–38), designed to prevent the principal method of fraud at the retail level—the refilling of bottles, the Senate Committee on Finance pointed out in 1958 (S. Rep. 2090, 85th Cong., 2d Sess. 171):

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[13] The first broad federal licensing provision covering retail liquor dealers was Section 79, part five of the Act of June 30, 1864, 13 Stat. 223, 251–252. See *License Tax Cases*, 5 Wall. 462, 469–475, discussing, and upholding the constitutionality of, this provision.

The inspection authority granted under this statute—which is the precursor of the legislative scheme involved in this case—provided in pertinent part (Section 37, 13 Stat. 238) that a revenue agent "shall be authorized to enter, in the daytime, any * * * building, or place where any property, articles, or objects, subject to duty or taxation under the provisions of this act, are * * * kept * * * so far as it may be necessary for the purpose of examining said property, articles, or objects * * *. And every owner of such * * * building, or place, or persons having the agency or superintendence of the same, who shall refuse to admit such officer, to suffer him to examine said property, articles, or objects * * * shall, for every such refusal, forfeit and pay the sum of five hundred dollars: *Provided, however*, That when such premises shall be open at night, such officers may enter while so open in the performance of their official duties."

Section 38 of the Act (13 Stat. 238) imposed a fine or term of imprisonment on any person who obstructed inspection or forcibly attempted to rescue the objects seized by the inspector. See, for later amendment, R.S. 3177 (Rev. Stat. 2d ed. 1878); 26 U.S.C. 3601 (1952 ed.). In 1954, these provisions became the present Sections 7606 and 7342 (see Appendix, *infra* p. 38) with "no material change from existing law." H. Rep. No. 1337, 83d Cong. 2d Sess., pp. A430, A436; S. Rep. No. 1622, 83d Cong. 2d Sess., pp. 609, 617.

372-507—70——3

> The prevention of the reuse of liquor bottles or other authorized containers for the packaging of any distilled spirits, or of the alteration of the original contents of liquor bottles or other authorized containers which have been used for the packaging of distilled spirits, is essential for the protection of the revenue since it is in most cases impossible, once the container has been refilled or the original contents thereof altered by the addition of any substance (whether taxable or nontaxable), to establish whether the tax on the contents of such containers has been lawfully determined.
>
> * * * It is essential to the effective operation of the system of control of distilled spirits for the protection of the revenue that Government officers and the public be able to rely on the integrity of the stamps, marks and brands on liquor bottles or other authorized containers of distilled spirits as credible evidence that the spirits at the time of purchase or sale remain exactly the same as they were at the time of affixture of the stamp in order to prevent the use of stamped authorized containers as an instrument in the aid of fraud.

When it enacted Section 5301(c), Congress also emphasized the need for authority to inspect retail liquor dealers' premises in order to control this threat to the revenue, by conferring such authority in Section 5146 (b) of the Act (see Appendix, *infra,* p. 37), even though similar inspection authority already existed under 26 U.S.C. 7606 (Appendix, *infra,* p. 38). The new provision, the Senate Committee explained, was intended "to reaffirm and clarify the authority of the

Secretary or his delegate with regard to the entry of wholesale and retail dealer premises for purposes of inspection" (S. Rep. No. 2090, 85th Cong. 2d Sess. 134).

3. The historical and legislative material thus shows that from the earliest times in England [14] and in the colonies the business premises of distillers, importers and liquor dealers were subject to inspection without a warrant; that after the Republic was formed such broad authority to inspect premises of liquor dealers was continued in the States; that the earliest federal legislation granted similar authority to inspect the premises of liquor distillers and importers; and that when the federal government later undertook to regulate the operations of retail liquor dealers, Congress specifically authorized similar inspection of their business premises.

Indeed, the validity of this nonwarrant authority seems to have been implicitly recognized in this Court's opinion *Boyd* v. *United States,* 116 U.S. 616 (1886), relied on by petitioner as descriptive of the reach of the Fourth Amendment (Pet. Br. 17). The question in that case was whether a person's private papers were subject to compulsory discovery in connection with a proceeding to forfeit his property. Mr.

[14] Great Britain has retained an extremely broad power of warrantless inspection. The Licensing Act of 1953, 1 & 2 Eliz. 2, c. 46, § 131(1), provides: "A constable may at any time enter licensed premises, or premises for which or any part of which a special hours certificate is in force * * * for the purpose of preventing or detecting the commission of any offense against this act." See, also, Customs and Excise Act of 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 44, § 131(5).

Justice Bradley, writing for the Court, found no "long usage, or any contemporary construction of the Constitution, which would justify" the Act under which production of such papers was sought to be compelled (116 U.S. at 622). In so ruling, however, the Court specifically affirmed the governmental right to reach articles on which excise taxes were due—*i.e.*, the very right at issue here. As the Court pertinently stated in *Boyd* (116 U.S. at 623–624):

> * * * [T]he seizure of goods forfeited for a breach of the revenues laws, or concealed to avoid the duties payable on them, has been authorized by * * * our own revenue acts from the commencement of the government. [Act of July 31, 1789, 1 Stat. 29, 43.] As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. * * *
>
> * * * [I]n the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment * * *.

In sum, it is fair to conclude that, at least where unsupervised liquor operations—whether by distillers, importers, rectifiers or retail dealers—have presented a real danger of defrauding the revenue, Congress has consistently authorized inspection of the business premises involved without evincing any belief that such inspections would be subject to the warrant provisions of the Fourth Amendment. This congressional judgment should be upheld by this Court.

B. THE DECISIONS IN *CAMARA* AND *SEE* DO NOT REQUIRE INVALIDATION OF CONGRESS' AUTHORIZATION OF WARRANTLESS INSPECTION OF THE PREMISES OF LIQUOR DEALERS

In addition to its historic and legislative credentials, the inspection authority at issue here is narrow and precise. It relates only to dealers in liquor (26 U.S.C. 5121(a), 5122(a), Appendix, *infra* p. 37) and provides for entry of their business premises (including places of storage) during business hours for the purpose, insofar as here pertinent, of examining "any distilled spirits, wines, or beer kept or stored by such dealer on such premises" (26 U.S.C. 5146(b), Appendix *infra* p. 37). The ultimate aim of the inspection is to assure compliance with the dealer's statutory obligation not to refill or otherwise alter the contents of stamped liquor bottles, and thus to prevent fraud on the revenue. The statutory scheme, therefore, serves an important governmental interest in a direct and circumscribed way.[15] There are substantial reasons, in our

[15] As noted (see *supra* p. 12, n. 12) in 1968, the federal government collected some $4,287,236,646.00 in taxes on distilled spirits, wine and beer. In that same year, there were 277,909 licensed retail liquor dealers. See Internal Revenue Service, *Fiscal 1968 Alcohol and Tobacco Summary Statistics* (1969), p. 2.

judgment, for not engrafting on this statutory scheme the warrant requirements announced in *Camara* and *See*.

1. In *Camara*, this Court held that the Fourth Amendment bars prosecution of one who has refused to allow a warrantless code-enforcement inspection of his personal residence. The companion *See* decision extended this rule to similar inspections of commercial structures not used as residences.

Of critical concern to the Court in *Camara* and *See* was the danger that the broad inspection authority involved in those cases gave too much discretion to the officer in the field and too little protection to individuals, who might have only minimal awareness of their rights.[16] The specific areas of concern noted by this Court were whether the occupant would know if enforcement of the code required inspection of his house, whether he would know the limits of the inspector's powers, and whether he would know if the inspector was acting under proper authorization. As

[16] The provision involved in *Camara* (387 U.S. at 526), Section 503 of the San Francisco City Housing Code, gave to "employees of the City departments or City agencies, so far as may be necessary for the performance of their duties, * * * upon presentation of proper credentials, * * * the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

The provision involved in *See* (387 U.S. at 541), Section 8.01.050 of the Seattle Fire Code, provided that, "It shall be the duty of the Fire Chief to inspect and he may enter all buildings and premises, except the interiors of dwellings, as often as may be necessary for the purpose of ascertaining and causing to be corrected any conditions liable to cause fire, of any violations of the provisions of this Title, and of any other ordinance concerning fire hazards."

the majority opinion in *Camara* put in (387 U.S. at 532–533):

> * * * Under the present system, when the inspector demands entry, the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization. These are questions which may be reviewed by a neutral magistrate without any reassessment of the basic agency decision to canvass an area. Yet, only by refusing entry and risking a criminal conviction [11] can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk * * * he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. * * * We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may

[11] In *Camara*, the criminal penalty for refusal to permit inspection was a fine not exceeding $500 and/or six months imprisonment (387 U.S. at 527, n. 2). In *See* the penalty was a fine not to exceed $300 and/or imprisonment for 90 days (387 U.S. at 542, n. 1).

> only be invoked at the risk of a criminal penalty.

A similar concern was expressed in *See,* the Court noting that the "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property" (387 U.S. at 543).

The second area of inquiry deemed significant in *Camara* was whether, despite the intrusion on privacy, the "public interest" required "warrantless administrative searches" (*Camara,* 387 U.S. at 533). After noting that it "has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement" (*ibid.*), the Court in *Camara* found that a search warrant procedure would not be "likely to frustrate the governmental purpose behind the search" (*ibid.*). In *See,* the Court recognized that entry upon commercial premises was a common technique employed by administrative agencies, and found "strong support" for a warrant procedure in an analogy to administrative subpoenas as an established and workable investigative tool. It concluded that "warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises" (387 U.S. at 543–544; see, also, *id.* at 546).

Turning to the question of how the warrant procedure was to be utilized, the Court in *Camara* stated that "routine periodic inspections of all structures" (387 U.S. at 535–536) are reasonable searches within the meaning of the Fourth Amendment and concluded

that " 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" (387 U.S. at 538). In *See*, the Court, as aforementioned (*supra* p. 20), focused on the elements which justified the issuance of administrative subpoenas in indicating the nature of the showing that had to be made to justify a search of business or commercial premises. Presumably, the magistrate would assure that the warrant would "be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome" (387 U.S. at 544). There was also the suggestion that the businessman could seek judicial review of the propriety of the inspection "prior to suffering penalties for refusing" to permit it. (387 U.S. at 545). The Court further pointed out that it was not deciding whether warrants could be obtained only after access to business premises had been refused, "since surprise may often be a crucial aspect of routine inspections of business establishments" and "the reasonableness of warrants issued in advance of inspection will necessarily vary with the nature of the regulation involved and may differ from standards applicable to private homes" (387 U.S. at 545, n. 6).[18]

[18] In *Camara*, the Court said, with regard to residences, that "it seems likely that warrants should normally be sought only after entry is refused unless there has been a citizen complaint or there is other satisfactory reason for securing immediate entry" (387 U.S. at 539–540).

2. When applied to the problem at issue here, the three considerations emphasized in the *Camara* and *See* opinions—the demands of privacy, the public need for the warrantless searches, and the standards to be employed in issuing warrants—support, in our judgment, the liquor inspection procedures Congress has authorized.

a. In contrast to the typical homeowner, or even the typical businessman, who might be unfamiliar with municipal housing and fire codes and might therefore unwillingly permit unauthorized entry of an inspector rather than risk criminal prosecution, the retail liquor dealer is in a business which is pervasively regulated by State and federal law, and he must be familiar with these regulatory requirements in order to conduct even the most trivial aspect of his daily business affairs. He is not asked to apprise himself of a broad range of detailed safety requirements only remotely or tangentially related to his business; he is required only to know what restrictions have been placed on his dealings in one product—a product which by the required stamp itself bears the indicium of the federal interest. When revenue agents present their identification at his business premises during business hours and request access to an area expressly made available to them by statute to examine his distilled spirits, the retail liquor dealer is in no position to claim that he is uncertain as to the nature or limits of their authority. Nor can he claim that he is unaware of the reason for inspection, since he is specifically forbidden by 26 U.S.C. 5301(c) (see Appendix, *infra* pp. 37–38) to alter the contents of any bottle of distilled spirits, and he must

be taken to know that the purpose of that prohibition is the protection of the federal tax revenues.[19] In these circumstances, a retail dealer in liquor can hardly assert—as petitioner does here—that he has a reasonable expectation of freedom from government inspection without a warrant of the storage space where he keeps his bottles of liquor. Compare *Mancusi* v. *DeForte,* 392 U.S. 364, 369; *Katz* v. *United States,* 389 U.S. 347, 351.[20]

As noted, we recognize that the Court in *See* relied in substantial measure on the common use of administrative subpoenas in concluding "that warrants are a necessary and a tolerable limitation on the right to enter upon and inspect commercial premises" (387 U.S. at 544). But the Court there was referring to proceedings under statutory schemes which had no bearing on the examination of taxable articles (see 387 U.S. at 544, n. 4 & 5). The distinction drawn by Mr. Justice Bradley in *Boyd* (see *supra,* p. 16) between the right of the government to reach books and records and its right to reach taxable articles simi-

[19] We are advised by the Internal Revenue Service that advice to this effect is contained in written material periodically distributed to retail liquor dealers.

[20] An alternative articulation of this rationale suggested by the court of appeals is that when one enters a highly regulated business, such as that of a dealer in liquor, he in effect "submits himself to statutory authority to the extent of permitting warrantless inspection of alcoholic beverages on his business premises" (A. 54a, 410 F. 2d at 203). See, *e.g.*, *Zap* v. *United States,* 328 U.S. 624, vacated on other grounds, 330 U.S. 800; *Davis* v. *United States,* 328 U.S. 582; *Peeples* v. *United States,* 341 F. 2d 60 (C.A. 5), certiorari denied, 380 U.S. 988; *Ray* v. *United States,* 374 F. 2d 638 (C.A. 5), certiorari denied, 389 U.S. 833.

larly suggests that the subpoena analogy is inapplicable here. Cf. *Peeples* v. *United States,* 341 F. 2d 60, 63–64 (C.A. 5), certiorari denied, 380 U.S. 988.

Moreover, as the court below pointed out (A. 50a-51a; 410 F. 2d at 201–202), in contrast to the danger noted in *Camara* that the subject of the inspection may have no way of knowing the nature and limits of the inspector's authority (387 U.S. at 532), there is only the remotest danger that the Internal Revenue inspector would use his authority to examine distilled spirits as a guise for conducting general exploratory searches. His sole authority under the present statutory scheme is to inspect the premises of the liquor dealer during business hours in connection with the product of his business. An authorization of such limited scope and purpose does not have the potential for misuse which would require the intervention of a magistrate before the fact in order to prevent abuse.

In short, the magistrate asked to issue a warrant authorizing the inspection of a retail liquor dealer's premises could do no more than is presently done by statute. In the vast majority of cases, he could be presented with no information on which to base a more reasoned judgment than that exercised by the agents themselves, and he would reasonably limit the scope of the inspection to those areas and those times already specified in Sections 5146(b) and 7606. Given the nature of the persons whose businesses are subject to inspection, their involvement in a complex system of regulation, and the narrow scope of the

authorizing statute, we submit that, on balance, the competing ends of the privacy of the individual dealer and the effective protection of the revenue will best be served by testing the validity of any particular inspection after the fact rather than by requiring the prior approval of a magistrate.[21] As the court below trenchantly summarized the matter (A. 52a; 410 F. 2d at 202):

> * * * Here the area eligible for inspection is clearly and narrowly defined; the purpose is relevant; the scope is limited; and all of these aspects are well known to the operator of the premises being inspected. Nothing of consequence therefore would be achieved through individualized review by a magistrate. In the proper exercise of his discretion, the magistrate would be compelled to issue a warrant as a matter of course, duplicating the limited authority already granted by statute. In short, the statute here under consideration is the equivalent of a warrant.

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[21] Thus, petitioner's reliance (Pet. Br. 21) upon *Finn's Liquor Shop, Inc.* v. *State Liquor Authority*, 24 N.Y. 2d 647, 249 N.E. 2d 440, is misplaced. In that case, inspectors of the State Liquor Authority entered Finn's retail liquor shop and searched a coat hanging in the rear of the store. Slips found therein showing that, in violation of state law, sales had been made on credit were thereafter introduced in an administrative proceeding resulting in a suspension of Finn's license. As the New York Court of Appeals pointed out, the search of the coat was not within the statutory grant of inspection authority (249 N.E. 2d at 444–445). Moreover, in discussing the reach of *See* the court observed that the opinion in that case had indicated "that the Constitution might not inhibit certain narrowly defined inspection procedures," citing the instant case as an example (*id.* at 445).

b. The second pertinent area of inquiry—"whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search" (*Camara,* 387 U.S. at 533)—likewise suggests that the present statutory scheme is reasonable and hence permissible under the Fourth Amendment.

As we have emphasized (see *supra,* pp. 12–14), these statutes are designed to avoid the loss of sizable amounts of revenue through fraud. The evidence of that fraud perpetrated by a liquor dealer who has refilled liquor bottles can be removed completely and with dispatch. If the suggestion of *Camara* is followed, that "warrants should normally be sought only after entry is refused" (387 U.S. at 539) the result, as the court below pointed out, would be that "the cat would be let out of the bag," the dealer would destroy the evidence of his fraud before a warrant could be obtained "and the essential government purpose would be frustrated" (A. 53a; 410 F. 2d at 203). Although such a result may be an acceptable resolution of the problem in the case of a homeowner who eliminates a fire or safety hazard, it would accomplish nothing here except frustration of the statutory purpose.

If, on the other hand, as is suggested in *See,* warrants are to be obtained in advance of inspection because here the element of "surprise" is "a crucial aspect" (387 U.S. at 545, n. 6), then the entire inspection procedure employed by the Internal Revenue Service with regard to retail liquor dealers would have to be radically remodeled. In fiscal 1965, the latest year for which accurate figures are available, 13,366

inspections of retail liquor dealers were conducted throughout the nation,[22] and this figure represents only a minor percentage of the total number of licensed retail liquor dealers. (There were some 277,909 in 1968.) Very few of these dealers refuse consent to an inspection.[23] Obviously, the blanket use of a warrant procedure would be wasteful and would tend to antagonize the law-abiding dealers. Moreover, there would be the risk that dealers might be "tipped off" when warrants are obtained and destroy the evidence before the agents arrive on the scene.[24]

Since "the controlling standard [is] reasonableness" (*Camara*, 387 U.S. at 539),[25] we submit that the sub-

[22] In fiscal 1963 there were 24,154 inspections, and in fiscal 1964 there were 23,883.

[23] The estimate of the refusal rate in the North Atlantic region is 1 out of 75; the area supervisors of the Mid Atlantic region could not recall any refusals or objections to conducting inspections.

Hammond Milling Company et al. v. *United States*, presently pending on petition for a writ of certiorari, No. 648, this Term, involves the question whether inspectors of the Food and Drug Administration inspected a food processing plant with the consent of the owner, and does not put in issue whether such a search could be made without consent in the absence of a search warrant. We are advised that when Food and Drug Administration inspectors are denied entry, they seek to obtain a warrant before returning to the premises sought to be inspected.

[24] As the court below pointed out, an "advance tipoff" was frequent during the Prohibition era (A. 53a).

[25] The Court accordingly pointed out in *Camara* (387 U.S. at 539) that "nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations. See *North American Cold Storage Co.* v. *City of Chicago*, 211 U.S. 306 (seizure of unwholesome food); *Jacobson* v. *Massachusetts*, 197 U.S. 11 (compulsory smallpox vaccination); *Compagnie Fran-*

stantial disadvantages of using a warrant procedure in this field justify, in light of the minimal additional safeguard of any right of privacy that warrants would provide (see *supra*, pp. 22–25), Congress' authorization of limited inspections of retail liquor premises without warrants.

c. The third factor considered in *Camara* and *See* was the standards to be employed in determining whether to issue warrants. Those suggested in *Camara* would not meet the need here. Passage of time and the condition of the general area (see *Camara*, 387 U.S. at 535–538) are considerations basically unrelated to the need for inspection of a liquor dealer's premises. Nor are there apt to be any other outward signs which would reveal such a need.

The fact of the matter is that the inspection criteria employed in this field are, of necessity, somewhat elastic in nature. They vary from region to region. We are advised that at the present time in the North Atlantic and Mid-Atlantic regions inspections of dealers are "based on some reason to believe or suspect"—less than probable cause (cf. *Terry* v. *Ohio*, 392 U.S. 1)—that a refill violation is occurring. We are further advised, however, that this is not a fixed or invariable policy, but one dependent on manpower availability, the peculiar requirements of local regions, the number of violations discovered and other factors. In addition,

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caise v. *Board of Health*, 186 U.S. 380 (health quarantine); *Kroplin* v. *Traux*, 119 Ohio St. 610, 165 N.E. 498 (summary destruction of tubercular cattle)."

greater emphasis is placed upon dealers who engage in the sale of liquor for on-premises consumption. But this also is subject to changing circumstances and needs. This flexible approach is peculiarly appropriate to the specific purpose of these inspections and the problems involved in detecting fraud on the revenue in this field—but it is not an approach which seems conducive to meaningful decision making by judicial officers in the context of warrant proceedings.

Thus, this factor, like those discussed heretofore, supports the congressional choice of a limited liquor inspection system which does not require the use of warrants. Since, as *See* pointed out, the reasonableness of regulatory inspection schemes is to be decided "on a case-by-case basis" (387 U.S. at 546), the decision here should be to uphold this congressional judgment as consonant with the requirements of the Fourth Amendment.

II

THE INSPECTION HERE WAS NOT VIOLATIVE OF THE STATUTORY SCHEME NOR WAS THE SEARCH RENDERED UNREASONABLE BY THE BREAKING OF THE STOREROOM LOCK

We have argued in the foregoing portion of this Brief that the statutory inspection scheme at issue in this case comports with historic practice and is not inconsistent with the rulings in *Camara* and *See*. The question remains whether that authority was validly implemented in this case in light of the forced entry into the storeroom. It is our position that the force

used here was within statutory authority and did not violate the Fourth Amendment.[26]

A. It is arguable that, because 26 U.S.C. 7342 (see Appendix, *infra* p. 38) provides for a forfeiture of $500 each time the owner of premises refuses entry to an Internal Revenue inspector, nonconsensual entries, such as that into the storeroom in this case, are not authorized. The argument would be that statutory forfeiture and, in appropriate cases, criminal prosecution[27] are the exclusive remedies for refusals by liquor dealers to permit inspections and hence that any use of force by the agents to override such a refusal is impermissible.

We submit that such an interpretation would frustrate the core purpose of the statutory scheme. Congress sought to prevent frauds on the revenue by authorizing revenue agents, so far as relevant here, to inspect liquor bottles to determine if they had been refilled or their contents in any way altered. It granted this authority because this was the only way to determine if liquor dealers were complying with the bottling law. If they were not—if, for example, some dealers were using distilled spirits obtained from the illicit traffic to refill their bottles—

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[26] The overall validity of the statutory scheme is not, of course, dependent on the Court's agreement with our contention that the use of force in this case was valid. We are advised by the Internal Revenue Service that the present case is the only one in which, to their knowledge, force has been used to gain entry to the premises of a retail liquor dealer.

[27] 26 U.S.C. 7212(a) makes it a felony punishable by a fine and/or a maximum of 3 years imprisonment, *inter alia*, to use "force or threats of force" to impede any officer or employee of the United States in carrying out his statutory duties.

they could defraud the revenue of very large sums of money. In these circumstances, government supervision only of authorized distillers would not prevent the fraud. It is clear that Congress extended inspection authority to the premises of retail dealers in order to eliminate such gaps in the statutory enforcement scheme. Nor could Congress, in its concern to prevent fraud on the revenue, have intended to give the liquor dealer the option to substitute the payment of a civil fine[28] for making his stock available for inspection.

There are, we submit, more reasonable interpretations which would better serve the overriding statutory objective. One possibility is that Congress was in effect saying to the liquor dealer: "any attempt on your part to prevent inspection will be met by the use of reasonable force to accomplish the statutory objective, and use of force on your part to deny an officer admittance may subject you to a $500 civil fine or criminal prosecution." So interpreted, the threat of forfeiture or criminal prosecution would be an inducement to permit inspection. At the same time, this interpretation would be in keeping with the common law rule that forcible entry, with its concomitant danger to person and property, should be used by inspecting agents only as a last resort. Another possible interpretation is that the congressional purpose was to afford alternative remedies to

[28] 26 U.S.C. 7342 provides for the $500 forfeiture where there is refusal to comply with a demand for inspection under 26 U.S.C. 7606. Another provision of the Code, 26 U.S.C. 7401, provides authority to institute a civil action to collect a forfeiture. See, also, 26 U.S.C. 7323.

the enforcement officer. On this analysis, the inspector could make a reasoned judgment whether the circumstances call for an entry despite refusal, or whether the statutory alternatives would provide a sufficient remedy. Of course, any alleged abuse of such discretion by the use of excessive force in gaining entry would be subject to judicial remedy by way of a motion to suppress.

There may be other interpretations that also are consistent with the statutory purpose, but there is no need in this case for the Court to choose among them. We stress only that it would frustrate the statutory objective to hold that reasonable use of force, such as occurred here, is not authorized where there has been an affirmative refusal to comply with a request for inspection. In *See,* this Court recognized that physical force might be used "within the framework of a warrant procedure" to gain entry to commercial premises (387 U.S. at 545). Since, in accord with the opinion below, we are of the view that the statutory authorization at issue here is basically the equivalent of a warrant, we believe that the use of minimal force—as here—to gain entry to the storeroom of a retail liquor dealer during business hours is consistent with *See.*

B. The reasonable use of force in gaining entry to premises does not *per se* violate the Fourth Amendment. *Miller* v. *United States,* 357 U.S. 301; *Sabbath* v. *United States,* 391 U.S. 585. As the Court noted in

Miller, supra at 313, Congress has, in 18 U.S.C. 3109,[29] codified "a tradition embedded in Anglo-American law"; accordingly each use of force must be tested against the standards underlying that statute.

It should first be noted that, by its terms, Section 3109 deals only with the right to use force in entering a house. The common law rule was directed solely at that issue, see *Semayne's Case,* 5 Coke 91, 77 Eng. Rep. 194 (1603), and Congress adopted it essentially without change.[30] Neither William Pitt, quoted in *Miller, supra* at 307, nor Congress was dealing with the right of the tax collector to enter the liquor dealer's premises in order to examine his liquor bottles.

In any event, the requirements of Section 3109 were clearly met in the instant case. The agents announced their identity and purpose, after gaining access to the general premises which were open to the public. They awaited the arrival of the person alleged to have the authority to open the storeroom, repeated their request and stated that they were authorized to inspect the storeroom without a warrant. Only when they were again refused admittance did they break the lock. The agents were not seeking to invade a residential

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[29] "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

[30] This limitation of Section 3109 to the search of houses has been noted in *Fields* v. *United States,* 355 F. 2d 543 (C.A. 5), petition for certiorari dismissed, 384 U.S. 935; and *United States* v. *Hassell,* 336 F. 2d 684 (C.A. 6).

area; and the person in control of the storeroom had refused to open it and thus protect his property against whatever damage might ensue. In these circumstances, the limited amount of force employed was necessary in order for the agents to effectuate their statutory duty. As the court below put it, "[t]here would be no point in holding warrantless searches by alcohol tax inspectors to be reasonable if the owner of the premises could render them unreasonable by withholding his consent and compelling the agent to use the minimum amount of force necessary to accomplish his objective" (App. 56a; 410 F. 2d at 204).

This is not to say that agents may invade those parts of a dealer's premises which are, in fact, private [31] or may search the dealer's clothing.[32] Rather, our submission is that agents, who are restricted to making their inspections during hours when the dealer's business is open to the public, may use a reasonable amount of force, when necessary, to penetrate internal barriers standing between them and the bottles they are specifically authorized to examine.

In sum, we submit that the reasonableness of each search conducted pursuant to 26 U.S.C. 5146(b) and 7606 must be tested on its facts. Its scope and manner of execution may be readily challenged, as was the inspection here, by a motion to suppress and return, and where the agents have gone beyond the bounds of their authority either in the nature of the places

[31] *United States* v. *Frisch*, 140 F. 2d 660 (C.A. 5).

[32] *Finn's Liquor Shop, Inc.* v. *State Liquor Authority*, 24 N.Y. 2d 647, 249 N.E. 2d 440 (see *supra*, p. 25, n. 21).

searched or in the amount and type of force used, an effective sanction is available. Since no showing of abuse was made here, there is no ground for reversal of the judgment below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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APPENDIX

26 U.S.C. 5121(a) provides:

> Retail dealers in liquors.—Every retail dealer in liquor shall pay a special tax of $54 a year. * * *

26 U.S.C. 5122(a) provides:

> Retail dealers in liquors.—When used in this chapter, the term "retail dealer in liquors" means any dealer, other than a retail dealer in beer or a limited retail dealer, who sells, or offers for sale, any distilled spirits, wines, or beer, to any person other than a dealer.

26 U.S.C. 5146(b) provides:

> Entry of premises for inspection.—The Secretary or his delegate may enter during business hours the premises (including places of storage) of any dealer for the purpose of inspecting or examining any records or other documents required to be kept by such dealer under this chapter or regulations issued pursuant thereto and any distilled spirits, wines, or beer kept or stored by such dealer on such premises.

26 U.S.C. 5301(c) provides:

> Refilling of liquor bottles.—No person who sells, or offers for sale, distilled spirits, or agent or employee of such person shall—
>
> (1) place in any liquor bottle any distilled spirits whatsoever other than those contained in such bottle at the time of stamping under the provisions of this chapter; or
>
> (2) possess any liquor bottle in which any distilled spirits have been placed in violation of the provisions of paragraph (1); or

(3) by the addition of any substance whatsoever to any liquor bottle, in any manner alter or increase any portion of the original contents contained in such bottle at the time of stamping under the provisions of this chapter; or

(4) possess any liquor bottle, any portion of the contents of which has been altered or increased in violation of paragraph (3); * * *.

26 U.S.C. 7606 provides in pertinent part:

Entry of premises for examination of taxable objects.

(a) Entry during day.

The Secretary or his delegate may enter, in the daytime, any building or place where any articles or objects subject to tax are made, produced, or kept, so far as it may be necessary for the purpose of examining said articles or objects.

(b) Entry at night.

When such premises are open at night, the Secretary or his delegate may enter them while so open, in the performance of his official duties.

26 U.S.C. 7342 provides:

Any owner of any building or place, or person having the agency or superintendence of the same, who refuses to admit any officer or employee of the Treasury Department acting under the authority of Section 7606 (relating to entry of premises for examination of taxable articles) or refuses to permit him to examine such article or articles, shall, for every such refusal, forfeit $500.

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